1998

Randy G. Moon v. Career Service Review Board, and the Utah Department of Natural Resources : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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RANDY G. MOON, Petitioner, vs. CAREER SERVICE REVIEW BOARD, and the UTAH DEPARTMENT OF NATURAL RESOURCES, Respondent.	**APPELLANT'S REPLY BRIEF AND RESPONSE TO CROSS-PETITIONER'S BRIEF** Case No. 980134-CA Priority 14
STATE OF UTAH, DEPARTMENT OF NATURAL RESOURCES, Petitioner, vs. UTAH CAREER SERVICES REVIEW BOARD, Respondent.	

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INTRODUCTION

Initially, the Level 5[1] hearing officer concluded that Moon's termination was appropriate in light of what she labeled a "pattern of conduct". R., 45. The hearing officer found that Moon had intentionally violated state regulations by not stopping his adult son, Nathan, from shooting an antelope which was a hundred yards across the state line. The hearing officer also found that Moon had "abused his position" by inquiring as to whether, and how, his son's PHU permit could be transferred to another unit. From these two incidents, the hearing officer decided that Moon had engaged in a "pattern" of misconduct which warranted termination.

In fact, no pattern existed, as the CSRB held[2] on appeal that the there was no substantial evidence to support the allegation of "abuse of position", because neither Randy Moon nor his son, Ryan, acquired any benefit to which they were not entitled by law. R, 143-144.

This leaves the Department with only the wildlife incident - an incident for which the Department did not terminate Moon until after the "abuse of position" charge had been made[3] - an incident in which Moon was not the shooter, and where no intentional violation

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[1]The Level 5 hearing is conducted by a hearing officer under the control of the Career Service Review Board.

[2]The hearing officer's decision was appealed to the CSRB Board, which issued a separate opinion.

[3]The Department did not conduct an investigation until after it was informed of the wildlife incident. Moon was then suspended pending this investigation. The Department then told Moon it had "discovered" that Moon had engaged in an "abuse of position" - something about which the Department had known for three months.

was committed. Even if this Court assumes that the facts concerning the wildlife incident are exactly as found by the CSRB, Moon's actions relating to this incident do not merit termination. The Department knew this when it refrained from terminating Moon after the wildlife incident, and knows this even now as it attempts to have the Court overturn the CSRB's decision regarding the "abuse of position" charge. There would be no other reason to assert that cross-appeal, inasmuch as the Department was awarded the relief sought (i.e. upholding the termination).

The CSRB did not err when it found that Moon had committed no abuse of position; its error was upholding Moon's termination based solely on the wildlife incident. This was not contemplated by the Department at the time of Moon's termination, nor by the hearing officer when she upheld said termination. Termination is simply not warranted by a single, unintentional act, even *if* that act was negligent. Therefore, the determination that Moon's termination was proper for his participation in the wildlife incident should be overturned.

STATEMENT OF ADDITIONAL FACTS

1. Moon was not immediately terminated by the Department for his participation in the wildlife incident. Instead, he was placed on suspension pending an investigation. Moon's son, Nathan, was immediately terminated from his seasonal position with the Department. R. at 146-147, 893-897.

2. The Department's investigation came up with the charge of "abuse of position", for an incident which allegedly occurred in October, 1997 - months before the wildlife incident, and something which had never even been reported by the Ogden office. R., 350-

352. Moon was then terminated after this investigation had been completed, for both the wildlife infraction and the "abuse of position" charge. R., 52, 147.

3. Moon appealed his termination to the CSRB. At a Step 5 hearing, Moon's termination was upheld on the basis of a "pattern of abuse", namely, the wildlife incident and Moon's "abuse of discretion". R., 34-52.

4. Moon appealed this decision to the CSRB. After considering written memorandum and hearing argument, the Board held that Moon did not engage in an abuse of position (but upheld the termination based on the wildlife charge alone). R., 133-144, 154.

5. The following facts pertain to the "abuse of position" charge. In July, 1997, Moon's son Ryan had drawn a permit to hunt Moose on a PHU in Utah. This PHU was entitled "East Fork Chalk Creek". R., 135. [4]

6. A PHU is a privately owned area of property on which landowners allow both public and private visitors to hunt. Public hunters are selected to hunt through a random drawing. R., 135. Up until 1993, PHU's were administered on an experimental basis, and interim guidelines were used by the Department to help supervise the PHUs. The PHU program has now been codified by the Utah legislature, and the Department has created various rules and regulations for these PHUs. However, many new proclamations and regulations have come about in recent years, creating a good deal of confusion, and ensuring that no Department official could know every applicable rule. R., 581-584; 1094-1101.

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[4]There is no allegation that there were any improprieties with this draw.

7. In or about September, 1997, Moon was informed by Cal Haskell, manager of the PHU, that no moose had been found on the particular PHU Ryan was to hunt on. Haskell informed Moon that he was going to transfer all of the "East Fork" hunters (i.e. both private hunters who paid to hunt and public hunters), including Moon's son Ryan, to another PHU at "South Fork". This transfer was at no time suggested by Moon, nor did Moon do anything at all to facilitate such transfer. R., 136; 754-755; 841-843.

8. In October, 1997, Haskell again called Moon. This time, Haskell informed Moon that the transfer had been arranged for three private hunters on the PHU. The transfer was done by Haskell, who had submitted a letter to the Ogden regional office pursuant to instructions he received from the Ogden office. Haskell also informed Moon that his son, Ryan, had been left off the transfer list by mistake. R., 136.

9. Haskell also told Moon that he had tried to reach Lou Cornicelli, the regional manager in Ogden, but had been unable to do. Haskell then asked Moon if he could contact Cornicelli instead. R., 137-138.

10. Wanting to ensure that everything was legitimate, Moon first spoke with Wes Shields, the wildlife section manager, and head of the PHU program, to ask him about transfer protocol. Shields looked at the regulation, and told Moon that a transfer from one PHU to another was allowed, as long as approval was received from the Ogden regional office. R., 620-622; 845-848.

11. Moon then called Cornicelli and explained the situation to him. Cornicelli told Moon he needed to speak to his supervisor, Robert Hasenyager, first. Hasenyager instructed

Cornicelli to simply write in Ryan's name on the transfer list. Cornicelli did so, and informed Moon that his son would be added to the transfer list. Cornicelli later faxed a copy of this list to Moon. Importantly, both Haskell and Cornicelli testified that there was no coercion whatsoever placed upon them by Moon. R., 139; 695-698; 845-848.

12. After his suspension for the wildlife incident, and after the investigation of Ryan's transfer some three months after the fact, Moon was informed that he had also committed an "abuse of position" violation, and was being terminated purportedly for this "abuse", as well as for the wildlife incident. Moon was terminated in February, despite the fact that the moose hunt itself had occurred in October, while the wildlife incident had occurred in December, 1997. Moon was not cited, reprimanded or otherwise penalized for the transfer to the "South Fork" PHU until his February termination, despite the fact that all relevant facts were known by the Department in early October. R., 855-859; 896-897.

13. The other Department officers involved in the addition of Ryan Moon to the transfer PHU were not terminated. Lou Cornicelli, who had authorized the addition, was not even reprimanded for the incident. Cornicelli's superior, Robert Hasenyager, who had approved the addition, was only given a letter of caution, and received no discipline from the Department. R., 368; 726-727.

ARGUMENT

A. MOON'S REPLY IN SUPPORT OF HIS APPEAL.

I. THE CSRB DID NOT CORRECTLY APPLY THE LAW, INCLUDING POLICIES, RULES AND STATUTES, IN ITS DETERMINATION TO UPHOLD MOON'S TERMINATION.

Although the Department attempts to spin or otherwise misstate Moon's arguments, the real question before the Court is whether Moon should have been terminated for a single, unintentional wildlife violation. Under CSRB precedent, rules and statutes, it is evident that the CSRB erred in its determination. The Department's arguments do not lead to a contrary result.

1. Although a Correction of Error Standard Applies, Moon Has Nevertheless Marshaled the Evidence to Show That His Wyoming Citation was Unintentional.

The Department has stated its usual laundry-list argument that Moon has not marshaled the evidence that he intentionally participated in the wildlife incident for which the CSRB upheld his termination. However, this argument ignores a number of facts.

First, by his inclusion of the CSRB's findings in his Appellate Brief, Moon did, in fact, marshal the evidence necessary to show that he did not knowingly involve himself in the wildlife incident. The factual findings made by the CSRB simply do not show that Moon knew or should have known that Nathan Moon was in Wyoming when he shot the antelope. Instead, they show that there was confusion as to just where one boundary ended and another began once one left the main road. R., 144-146. Neither Ryan, Nathan nor Randy Moon knew they were in Wyoming when Nathan shot the antelope. R., 146. The fact that Moon, a respected state employee with an exemplary record, did not immediately turn his son in to

the Wyoming authorities only *bolsters* the fact that he did *not* know that an infraction had been committed at the time. Therefore, as Moon argues in his Appellate Brief, it simply is not reasonable or rational to believe that Moon knew or should have known he was in Wyoming when Nathan shot the antelope.

Second, the question on appeal is whether the finding that Moon "knew or should have known" he was in Wyoming, is enough to terminate Moon under the law, including all the facts, prior case law, relevant policies, rules, and statutes. Utah Admin. Code R137-1-21(D)(3). The standard for such a determination is a correction of error standard, which does not give deference to incorrect legal conclusions. *See* Savage Industries v. State Tax Commission, 811 P.2d 664 (Utah 1991). Thus, as explained in Moon's Appellate Brief, and below, even if the CSRB's factual findings as to the wildlife incident are "reasonable and rational", they do not lead to the legal conclusion drawn by the CSRB because CSRB precedent and other case law, rules and regulations, and the prior practice of the Department, all show that termination is simply too harsh a penalty for a single, unintentional mistake while off duty.

While the Department argues that Moon knowingly and intentionally engaged in an active violation of law, this was *not* the finding of the CSRB. Instead, the CSRB held that Moon "knew or should have known" that he was in Wyoming at the time of the wildlife incident. *See, e.g.*, R., 149, 153 (emphasis added). This is *not* the language used when holding someone accountable for intentional acts; instead, it is used to describe negligent or reckless conduct. *See* Galloway v. AFCO Development Corp.,777 P.2d 506, 509 (Utah

App. 1989)(finding that one "knew or should have known" describes negligent or reckless conduct, not intentional tort);Golding v. Ashley Central Irrigation Co., 793 P.2d 897, 901 (Utah 1990)(willful misconduct is not equivalent to gross negligence or recklessness). Thus, Moon's limited participation in the wildlife incident was not found to be intentional, but either negligent or at worst reckless. This finding, in light of Moon's record, his length of service, and other mitigating circumstances, including the fact that the Department has not terminated its employees for such conduct in the past, *see infra*, and in light of the applicable law, necessitates the legal conclusion that Moon should not have been terminated[5] for this single act. As Moon has argued throughout this litigation, his conduct simply lacks the culpability required for termination, as opposed to demotion or another form of discipline. Because the CSRB failed to reach this conclusion, it's decision is arbitrary and capricious and should be overturned.

For each of these reasons, the Department's laundry-list argument that Moon has not marshaled the facts is at once irrelevant and incorrect. What is relevant is that Moon was terminated in error.

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[5]As noted *infra*, neither the Department nor the CSRB ever explain why Moon could not have been disciplined without being terminated for the wildlife incident. Moon could have been demoted, sanctioned, or otherwise disciplined without being terminated. Indeed, progression of punishment is envisioned by Utah Admin. Code. R477-10-2 and R477-11-1(3). Without any discussion of other possible punishments, the Department applied and the CSRB enforced Moon's termination. The fact that other disciplinary tactics were wholly ignored provides yet another example of the arbitrary and unreasonable treatment afforded Moon throughout this litigation.

2. Division of Parks and Recreation v. Robert O. Anderson and D. Dennis Weaver Shows That the CSRB's Decision Was Unprecedented and Illogical.

In its Appellate Brief, the Department strives fervently to distance itself from prior CSRB precedent, namely the Weaver decision. 3 PRB 22 (1986). These efforts are understandable, as the Weaver decision clearly shows that Moon's participation in the wildlife incident did not merit termination. Although the argument is unclear, it appears that the Department contends that, due to a modification in the applicable CSRB Rule, had Weaver been decided under the present rules, Dennis Weaver's termination would have been upheld. The problem with this argument is three fold: first, and most importantly, this argument was not raised below. Therefore it should be ignored by this Court. Second, the Department has presented absolutely no evidence that Weaver would have been decided differently, and has wholly failed to explain why the reasoning and rationale of that decision should not apply to the case at hand; finally, the Department has failed to explain why the CSRB felt obliged to address Weaver in its decision if that case no longer applied.

It is black letter law that "issues not raised in the trial court in a timely fashion are deemed waived, precluding the [appellate court] from considering their merits on appeal". Hart v. Salt Lake County Com'n, 945 P.2d 125, 130 (Utah App. 1997), *quoting* Ohline Corp. v. Granite Mill, 849 P.2d 602, 604, n.1 (Utah App. 1993). *See also* West One Bank v. Life Ins. Co., 887 P.2d 880, 882, n.1 (Utah App. 1994). The Department *never* raised the issue that Weaver no longer applies below, either before the hearing officer or before the Board. In fact, throughout these proceedings, the Department has attempted to *utilize* or factually distinguish the Weaver case to show that Moon's actions were more culpable than Weaver's.

See, e.g., R., 105. This factual distinction was also argued orally before the Board. Therefore, the Department may not raise the claim that new regulations render Weaver obsolete before this Court.

However, even if the Court allowed presentation of this argument for the first time on appeal, the argument is without merit. The Department states that Weaver no longer applies because a different administrative Rule now governs the CSRB. The Department notes that the old Rule, in effect at the time the Weaver decision was made, stated that:

> The Board's standard of review consists of determining whether the Hearing Officer's decision was supported by substantial evidence and whether the decision is warranted by the facts.

Department's Brief, p.17. The Department then cites the new Rule, which states that

> [T]he Board must determine whether the decision of the CSRB hearing officer, including the totality of the sanctions imposed by the agency, is reasonable and rational based upon the ultimate factual findings and correct application of relevant policies, rules and statutes determined according to the above provisions.

Id., p. 18.

The Department cites no authority which states that these rules differ so substantially as to severely limit prior CSRB precedent or supervisory authority over hearing officers who err. The relevant cases cited by the Department instead hold that the CSRB *should* overturn a hearing officer's determination if the "sanction [imposed by the hearing officer] is so disproportionate to the charges that it amounts to an abuse of discretion". Lunnen v. Utah Dept. of Transp., 886 P.2d 70, 72 (Utah App. 1994); Utah Dept. of Corrections v. Despain, 824 P.2d 439, 443 (Utah App. 1991). While Despain was decided before the Rule changed,

and Lunnen was decided after the change, *both* cases hold that a termination should be overturned if disproportionate to his offense. Neither of these cases, nor the others cited by the Department, conclude that the amendment to Board Rule 19.8.2 materially changed the ability of the CSRB to reverse an employee's termination.

Nor can the difference the Department urges be discerned by reading the language of the two Rules themselves. If anything, the latter Rule *more clearly* allows the CSRB to review a hearing officer's decision in light of other statutes, regulations and precedent, and in light of common sense and all the circumstances. Not surprisingly, this is very similar to the decision-making process employed by the Board in the Weaver case. There, the Board looked to relevant statutes, 3 PRB 22, pp. 16-21 (1986), and prior case law, id., pp. 13-17, and assessed penalties in light of the totality of the circumstances, and the relative fault of the parties. Id., pp. 26-27, all while giving deference to the hearing officer's conclusions. Id., pp.6-8. Therefore, the fact that an old regulation has been reworded since the time Weaver was decided is a distinction without a difference, and does not provide the Department with a reason for ignoring the Weaver decision.[6]

Furthermore, the *CSRB itself made no mention of, or comparison between, the old and new Rules* when it addressed the Weaver decision. R., 151-152. Instead, the CSRB found

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[6]If the Department actually believed its own argument as to the CSRB's power to review a hearing officer's decision, it would not have ignored the fact that, despite acknowledging that "the hearing officer did not separate these two allegations [against Moon] to determine their individual assessment of a penalty", R., 144, the CSRB went ahead and made its own findings and conclusions as to the correct penalty for the wildlife incident alone.

that Weaver was factually distinguishable from Moon's case, and that Moon's culpability was more akin to Anderson's actions than Weaver's. R. 152. Moon has already addressed why this is not so in his initial Appellate Brief, and this will not be repeated here. The Department has not attacked or rebutted such arguments before this Court, but instead has claimed simply that Weaver no longer applies. It is clear that this argument is fallacious, as the CSRB itself felt that the Weaver decision had to be addressed. Otherwise, some mention of its inapplicability would have been made.

For each of these reasons, the Department's argument that Weaver no longer applies should be ignored. As Moon has already argued to this Court, Moon's actions, if anything, were *less* egregious than those committed by Dennis Weaver, while the status and circumstances of both Moon and Weaver were remarkably similar. Therefore, under CSRB precedent, as well as the "correct application of relevant policies, rules and statutes", Moon should not have been terminated for a single, unintentional offense.

3. No Similarly Situated Department Employees Have Received Termination as Punishment for a First Offense.

Moon argued in his Appellate Brief that no other Department employees had been terminated by the Department for a single, unintentional wildlife violation. Because Moon was terminated for his participation in such a violation, Moon argues that he was treated unfairly and arbitrarily by the Department, and that he had no warning that he might be terminated for such violation. In response, the Department states that none of the employees to which Moon refers in his Appellate Brief are "similarly situated" to Moon. This simply is not true. Indeed, the only reason one could argue that there are no "similarly situated"

employees is because the Department has never acted so unfairly and arbitrarily as it did against Moon.

Moon has given examples of eight other Department employees who committed similar or more egregious acts, but were not terminated for such acts. The Department has chosen to address only three of these individuals, and has chosen to ignore the fact that rank of the individuals cited in Moon's earlier Appellate Brief range from park rangers to assistant wildlife managers, all of which (according to the Department) are guided by the same "mission" and policies. While it may be true that none of these individuals held the same title as Moon did, it cannot be said that they were not similarly situated. Each of these individuals illegally hunted and/or killed wildlife, and each of these individuals received punishment drastically less severe than that handed to Moon. Whatever the definition of "substantially similar" may be, it does not equate to "identical" as the Department would suggest;[7] indeed, if comparisons were only to be made to "identically situated" employees as the Department urges, such comparisons could never be made at all.[8]

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[7]Pickett v. Dept. of Commerce, 858 P.2d 187 (Utah App. 1993) supports Moon's position. While the Court did not define "substantial similarity", it noted the importance (in relation to Utah Code Ann. § 63-46b-16(4)(h)(iii)) of comparing an employer's treatment of an employee with the employer's prior practices of discipline. Therefore, the Court compared the plaintiff with employees who committed "allegedly equal or more significant violations of the law, but received substantially lighter penalties." Id., at 191-192 (emphasis added). Moon has requested that this Court make the same comparisons.

[8]Finally, it should be noted that one of the only ways Moon had to obtain information concerning punishment of similarly situated employees is discovery through the Department. The Department has consistently denied complete discovery on this matter. For example, the Division redacted all names and gave only brief commentary of what occurred. Accordingly, if there are any deficiencies in the number of examples

Therefore, the Court should find instruction from the leniency shown by the Division of Wildlife Resources (DWR) to other similarly situated employees, and should hold that the termination of Moon for similar conduct was unwarranted, arbitrary and unreasonable. No one else in DWR history has been treated as poorly and unfairly as Moon for similar or even more egregious conduct. The same is true with the entire Department, with the exception of Dennis Weaver, whose termination was reversed. Through its treatment of similarly situated employees, the Department declared a policy which stated that a single, unintentional wildlife incident does not merit termination. The reason, as noted by Director John Kimball himself, is that employees are allowed an "honest mistake". R. 347. However, this policy was not to apply to Moon, and Moon alone. This would seem to be the very definition of arbitrary and unreasonable behavior on the part of Kimball and the Department, as well as the CSRB for upholding such behavior, providing Moon with no possible forewarning of his termination.

4. The Board Ignored Regulatory Law When it Ignored Mitigating Factors.

As argued in Moon's Appellate Brief, both the CSRB hearing officer and the CSRB itself largely ignored mitigating factors such as Moon's length of service with the State of Utah and the Department, his lack of prior infractions or discipline, and the fact that the punishment was more severe than that handled down previously by the Department. Fittingly, even the Department ignores the many mitigating circumstances of Moon's case in its Appellate Brief by stating that "Moon contends that his fifteen years of service with the

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given to the Court, the Department should not be heard to complain about them.

State of Utah is sufficient to overcome termination". Department's Brief, at p. 25. Moon contends that there is much more than this single factor, and that all of these factors render termination inappropriate for a single, off-duty act.

The Department also attempts to casually dismiss both Utah Administrative Code R137-1-20(I) and R477-11-1(3)(e), and states that reviewing mitigating circumstances is an entirely optional criteria which can be ignored by the CSRB. The Utah Supreme Court and this Court have held otherwise.

In State, Etc. v. Utah Merit System Council, 614 P.2d 1259, a similar argument was made regarding the Utah Merit System's procedural rules. However, the Court held to the contrary:

> Defendants contend that the procedural rules are merely "guidelines", but administrative regulations are presumed to be reasonable and valid and cannot be ignored or followed by the agency to suit its own purposes. Such is the essence of arbitrary and capricious action. Without compelling grounds for not following its rules, an agency must be held to them.

614 P.2d at 1263. Similarly, as noted by this Court in Holland v. Career Service Review Board, 856 P.2d 678 (Utah App. 1993), "It does not logically follow that an agency has discretion to violate its own rules simply because it had discretion to make those rules." 856 P.2d at 684 (Bench, *concurring opinion*). Judge Bench cited to the Utah Merit System Council case for authority. Id. *See also* R.O.A. General v. Utah Dept. of Transp., 347 Utah Adv. Rep. 11, 12 (Utah 1998).

It is clear that R137-1-20(I) and R477-11-1(3)(e) may not be ignored by the CSRB. Instead, as recognized by prior CSRB decisions, it is anticipated that factors such as past

work record, prior disciplinary actions, previous warnings, and consistent application of rules and standards will be investigated by the CSRB. *See* Utah Dept. of Transp. v. Rasmussen, 2 PRB 19, at 28-31 (1986)(three pages of findings concerning mitigating circumstances alone); Trooper Joe C. Bennett v. Utah Highway Patrol, 2 PRB/H.O. 23 at 13,14; 24-29 (independent findings of fact concerning mitigation utilized to set aside termination of employee); Bytheway v. Utah Dept. of Safety, 13 CSRB/H.O. 191 at 19-26 (1996) (eight pages discussing the mitigating factors of R477-11-1(1) before sustaining a dismissal). Otherwise, there would be no reason to include these Rules within the regulatory code. As Moon noted in his Appellate Brief, mitigating factors would have weighed in his favor had they been seriously considered by the CSRB. The Department's only response to this is that the "egregiousness" of Moon's acts outweighs his length of service, citing a case from the Illinois Court of Appeals. Even if length of service were the only mitigating factor involved here, and even if the CSRB had seriously considered this factor, the Department's citation is still off point. The Department's citation, Ruffin v. Dept. of Transp., 428 N.E.2d 628 (Ill. App. 1981), dealt with an intentional violation by a state employee. Furthermore, there is no discussion as to whether regulatory guidelines existed regarding mitigating factors. If case law is to help in this regard, it should be from Utah courts, or at least should analyze similar regulatory guidelines as R.137-1-20(I) and R.477-11-1(3)(e). The Department has presented no such case law.

Moon requests that this Court not ignore R137-1-20(I) and R477-11-1(3)(e), as was done by the CSRB, and as the Department urges. Moon makes this request for one reason:

when the factors contained within these Rules are applied to Moon's case, it should become clear that Moon's termination was inappropriate in light of all the surrounding facts and circumstances.

V. Nexus Has Not Been Established; Even if Established, Nexus Alone Does Not Require Termination.

The Department has argued that Moon's off-duty, unintentional act has sufficient nexus to his employment so as to sustain his termination for the wildlife incident alone. While this is belied by the fact that the Department *did not terminate* Moon until the second "abuse of position" charge was conjured, *infra*, it is also belied by the nexus requirement itself. Furthermore, the Department does not explain why a finding of nexus requires termination, as opposed to demotion or another less onerous form of punishment.

As noted by the Fifth Circuit, "in situations involving off-duty activities, the reviewing court will require the agency to demonstrate that removal will promote the efficiency of the service. Identification of the cause for removal is not sufficient; the agency must also establish the relationship between the employee misconduct and the adverse effect on the abilities to perform successfully its assigned functions." Bonet v. U.S. Postal Service, 661 F.2d 1071,1079 (5th Cir. 1981). This is similar to the reasoning found in Jan Wahlquist v. Utah Dept. of Corrections, 15 CSRB/H.O. 220, which held that "broad policy statements and conclusions do not...constitute substantial evidence [for termination]." In fact, the Wahlquist case directly contradicts the Department's argument that it can fire an employee for off-duty acts which "may" or "might" cause problems within the Department: "if that were the case, any violation of policy could easily be characterized as a serious violation

meriting termination...any violation of any policy could be characterized as serious in that it indicates that an employee "might act inappropriately on the job or put other...in jeopardy" to justify termination...Substantial evidence requires a more fact intensive analysis. Id. at p.21.

Here it is mere conjecture and self-serving testimony which has allowed the Department to justify its termination of Moon. *See, e.g.*, Department's Brief, p.33. There has been no showing that Moon's ability to perform his position was affected by his off-duty, unintentional acts, and no showing that such ability will be impaired in the future. Instead, all the Department has produced is testimony that it "might" affect such performance.[9] Moon should at least be given the chance to prove otherwise.

Because no nexus has ever been shown which connects Moon's off-duty mistake with his ability to perform his position, his termination should be reversed. However, even if nexus has been established, the Department gives no explanation as to why a finding of nexus requires termination, as opposed to demotion, change of position, or other less drastic forms of punishment.[10] If it is true, as the Department argues, that his ability to hold a

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[9]Clearfield City v. Dept. of Employment Sec., 663 P.2d 440 (Utah 1983), does not change this result. That case entailed unemployment benefits, and was covered by a statute which required that a claimant: (1) be discharged for an act or omission in connection with employment, which was (2) deliberate, willful or wanton. Id. at 442. This standard is not the same as the "nexus" standard required by cases such as Wahlquist. Of course, Moon would be happy to have this standard apply, as his acts were neither deliberate, willful or wanton.

[10]Indeed, throughout this case, the Department has wholly failed to explain why some less drastic form of punishment could not have been given, in light of Moon's prior record and lack of prior disciplinary problems. This simply fuels Moon's argument that

supervisory position may be affected by the wildlife incident, why could Moon not take a lower position, or one which focused on a different area? Why termination? This is something that has *never* been fully explained by the Department. There is nothing inherent in Utah or other case law which *requires* termination once a nexus is found; rather, termination for off-duty conduct *includes* a nexus as merely one of many requirements. The real question, as it always has been in this case, is whether Moon was rightfully terminated for a single (and off-duty) act of negligence, when termination was so disproportionate to the offense at issue. As this Court has previously noted, "If [an employee's] conduct was an isolated incident of poor judgment and there is no expectation that the conduct will be continued or repeated, potential harm may not be shown and therefore it is not necessary to dicharge the employee."Albertson's v. Dept. of Employment Sec., 854 P.2d 570, 574 (Utah App. 1993). Whether the Department is able to show a nexus or not, it is still unable to show that Moon's termination for an isolated incident is reasonable in light of all the facts, the CSRB's error, and relevant rules and case law.

B. MOON'S RESPONSE TO THE DEPARTMENT'S CROSS-APPEAL.

I. MOON DID NOT COMMIT AN ABUSE OF POSITION.

Moon's arguments against the Department's Cross-Appeal are three-fold. First, the Department does not have standing to assert its Cross-Appeal, since it was not "substantially prejudiced" by the CSRB's decision to uphold Moon's termination. Therefore, no appeal may be taken. Second, even if such standing did exist, it is clear that Moon did not commit an

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his termination was arbitrary and unreasonable.

"abuse of position" as alleged by the department. Moon did not obtain anything he was not otherwise entitled to, and did not use his position to obtain anything. Therefore, by definition, he did not engage in an abuse of his position. Finally, it is implicit from the Department's assertions to the contrary that Moon's wildlife violation alone was not sufficient to warrant termination. This same implicit admission was made when the Department refrained from immediately terminating Moon at the time the wildlife violation was committed. Therefore, as Moon argued to the CSRB, when the "abuse of position" allegations drop from the case, Moon's actions simply do not merit termination, for there is no longer a "pattern of conduct" as described by the CSRB hearing officer. For these reasons, the CSRB holding that Moon did not engage in an "abuse of position" should be upheld, while Moon's termination should be reversed.

1. The Department May Not Assert Its Cross-Appeal.

Moon has already argued in his Motion for Summary Disposition that the Department may not assert its Cross-Appeal, as the Department has not been substantially prejudiced nor "aggrieved" by the decision of the CSRB. Instead, the Department's decision to terminate Moon was upheld by the CSRB. Moon now renews his objection to the Department's Cross-Appeal, as it is impermissible under the Utah Code.[11]

Utah Code Ann. § 63-46b-16, which provides for judicial review of formal adjudicative proceedings, allows standing only for those who are "substantially prejudiced"

[11]Moon refers the Court to his Memoranda supporting his Motion for Summary Disposition for a full discussion of this argument.

by a the decision of a tribunal. Utah Code Ann. § 63-46b-16(4)(1953, as amended). Substantial prejudice "relates to the damage or harm suffered by the person seeking review and was written to ensure that a court will not issue advisory opinions reviewing agency action when no true controversy has resulted from that action." Savage Industries v. State Tax Com'n, 811 P.2d 664, 669 (Utah 1991)(emphasis added). The Department has suffered no harm or damage as a result of an agency decision - in this case the decision of the CSRB to affirm Moon's termination. Nonetheless, the Department still requests that this Court redetermine the findings of fact and conclusions of law which led to that decision.

The Utah Supreme Court has previously held that a party should not be allowed to "employ its adversary's appeal or petition as a vehicle to gain a greater benefit than that granted below". State v. South, 924 P.2d 354, 356 (Utah 1996); *see also* Tacoma v. Taxpayers of City of Tacoma, 743 P.2d 793, 796 (Wash. 1987)("Because [appellant] merely objects to the reasoning by which the trial court invalidated the ordinance, [appellant] cannot be considered 'aggrieved', and therefore does not have standing to appeal.") The Department merely objects to the reasoning of the CSRB, and not to its final decision. Therefore, the Department should not be allowed to assert, and has no standing to assert, its Cross-Appeal.

Since the Department has not been "substantially prejudiced" or otherwise "aggrieved", and therefore lacks standing to appeal, its Cross-Appeal should be dismissed.

2. Moon Did Not Commit An "Abuse of Position".

a. Moon Did Not Obtain Anything He Was Not Entitled To; Nor Did He Use, Let Alone Abuse, His Position To Obtain His Son's Hunting Permit.

The CSRB found that "Moon did not gain any personal, or family benefit, privilege, or advantage, nor did [his son] Ryan receive any benefit special privilege or advantage that he was not entitled to by law". R., 144. The CSRB further held that "the evidence as a whole does not show a violation of a rule, a statute or an abuse of authority or position by Randy Moon regarding his son's right to hunt". Id. As the Department has produced no evidence to show that such findings are not "reasonable and rational" under the circumstances of this case, this Court has no reason to overrule these particular findings of the CSRB.

Moon was charged by the Department with a violation of Utah Code Ann. § 67-16-4(3), which states that:

> A public officer or public employee may not:
> (3) use or attempt to use his official position to secure special privileges or exemptions for himself or others.

By definition, in order to find someone liable under this provision, it must be shown that the officer under scrutiny acquired something to which he was not entitled, and that the officer obtained this "special privilege" due to the nature of the officer's position. *Id.* The facts presented to the CSRB revealed that these elements were missing.

The facts of this case, and the findings of the CSRB, show that Moon did not use or abuse his position to obtain something he was not entitled to. Although Moon will not repeat

the entire list of facts which show he did not commit an "abuse of position"[12], it is important to set forth a few facts which are notably absent from the Department's Brief.

First, it is clear that Ryan Moon was entitled to the PHU transfer. Ryan, as a public hunter, was entitled to the same hunting right as the private hunters. Indeed, when Haskell submitted his letter in early October, Ryan's name should have been on that list. R., 140. Cornicelli testified that if a second letter containing Ryan's name had come to him from Cornicelli, that the transfer would have been approved by the Department. Id. at 448-49. No special privileges were obtained for Ryan Moon and therefore, there is no abuse of position.

Second, Ryan received neither the PHU permit, nor the addition of his name to the transfer list, unlawfully or through Moon's position with the Department. Moon never ordered or even requested that his son be placed on the transfer list. Instead, Moon only *inquired* as to how to correct this omission.[13] This is precisely what a public citizen could have done to take care of the problem. Indeed, the Department presented no evidence that such an inquiry would be treated any differently coming from a citizen. Even John Kimball, the man responsible for Moon's termination, testified that Moon was not gaining a benefit that he was not entitled to. R., 412. The only evidence presented shows that anyone who had a similar problem could take care of it exactly as Moon did, and would be treated in the same

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[12]Moon refers the Court to the findings made by the CSRB as to the "abuse of position" charge, R., 135-144.

[13]It should be recalled that the transfer of the hunters to the "South Fork" PHU was allowed, and was done according to regulations. Haskell sent the appropriate transfer letter to the regional office; he simply forgot to add Ryan's name to that list. R., 136-137.

fashion as Moon. R., 699-703 (elk permits transferred in similar fashion). There is simply no proof that Moon used or abused his office to obtain "special privileges".

Importantly, Cornicelli testified that at no time did he feel that he was pressured by Moon. R., 698-699. Further, Moon never told Cornicelli what to do nor did he request that Cornicelli take one course of action versus another. All Moon did was tell him the situation; it was Cornicelli and Hasenyager who made the decision to add Ryan's name to the pre-existing letter. R., 141-143.

Third, it should be remembered that Moon's only act, initiated after he was informed that his son was left off the PHU certificate, was to inquire as to how this problem should be solved. As noted by the CSRB, the Department admitted at the Step 5 hearing that it "does not have a written procedure, rule or guideline to deal with Ryan's situation where a name is negligently omitted from a PHU transfer request". R., 139. With a lack of regulatory guidance, Moon simply asked the "experts" what to do. The result was that Ryan's name was placed back on the list where it should have been in the first place.

Such conduct on the part of Moon does not and cannot constitute abuse of position. Moon did not in any way use his position or authority to get Cornicelli, or anyone else in Cornicelli's office, to do something they did not want to do. Moon simply explained the situation to Cornicelli, and how it should be handled, and Cornicelli, in concert with his supervisor Hasenyager, decided how to handle the situation. While the Department now contends that the request that Ryan's name needed to be added should have been made in

writing, the Department can give no explanation as to why Cornicelli and Hasenyager did not explain that to Moon. If they had, Moon could have easily replied.[14]

Finally, it should be noted that, although Utah Code Ann. § 67-16-4(3) prevents one from using an official position to secure special privileges for himself or others, this Chapter begins with the statement that it "does not intend to deny a public officer or employee the opportunities available to all other citizens of the state to acquire private . . . interests so long as this does not interfere with his full and faithful discharge of his public duties." Utah Code Ann. § 67-16-2. In other words, Moon cannot be guilty of an "abuse of position" unless he obtained something unavailable to any member of the public, or obtained something he was not entitled to.

Moon neither asked for nor received any "special privileges", and did not use or abuse his position to obtain any such privilege. Therefore, the CSRB's findings that Moon did not engage in an "abuse of position" are reasonable and rational considering all the facts of this case.

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[14]The Department's witnesses, Cornicelli, Hasenyager, Shields and others, also testified that these transfer rules were brand new for the '96 season. Cornicelli, in particular, testified that he was unfamiliar with their operation. R., 701. Indeed, the handling of the initial request from Cal Haskell in early October by Cornicelli and Hasenyager failed to follow Department procedures which required not a letter, but an amendment to the COR certificate, which amendment needed to be submitted to the office in Salt Lake (which was never done).

b. The Department Has Failed to Marshall the Evidence Against the CSRB's Determination That Moon Did Not Engage in an "Abuse of Position".

Ironically, it is the Department which has failed to show that, despite the supporting evidence and all reasonable inferences that can be drawn therefrom, the findings of the CSRB concerning Moon's alleged "abuse of position" are not supported by substantial evidence given the record as a whole. Stewart v. Bd. of Review., 831 P.2d 134, 138 (Utah App, 1992). Instead, it is clear from the preceding section that, when "every scrap of competent evidence" is reviewed, West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah App. 1991), the only reasonable holding is that Moon did not engage in an "abuse of position".

The Department argues that the CSRB was simply incorrect in its findings that Moon did not obtain anything to which he was not legally entitled, and that Moon did not use or abuse his position to do so. However, the Department fails to follow its own advice as written in its response to Moon's Appeal - it fails to marshal the evidence which shows that (1) Moon's son was entitled to the PHU transfer, (2) no violation of rule or statute occurred, and (3) Moon did not abuse his position in order to place his son on the PHU transfer, "where it lawfully belonged". R., 143.[15] Instead, it is clear from the facts outlined above, and those found by the CSRB, that the evidence as a whole show that Moon did not engage in an

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[15]It is also clear that the CSRB examined the Department's case law on "abuse of position", certain of which have been restated in the Department's Cross-Appeal, and found that such cases "do not apply to the facts and circumstances of [Moon's] situation". R., 143.

"abuse of position". Accordingly, the Court should accept the findings of the tribunal as to the "abuse of position" charge.

3. The Existence of the Department's Cross-Appeal Provides Further Proof That Moon's Termination Alone is Insufficient to Merit Termination.

Inherent in this case is the question, why would the Department appeal a decision in its favor if the wildlife incident alone was sufficient cause to terminate Moon? The answer to this question - that the wildlife incident was not sufficient cause - is borne out not only by the legal arguments posted by Moon in his Appellate Brief, and in section A of this brief, but statements (both implicit and explicit) made by both the Step 5 hearing officer and the Department itself.

In its decision to uphold Moon's termination, the Step 5 hearing officer held that Moon "was involved in two separate and serious incidents. The two incidents show a pattern of conduct which exhibits less than high regard for complying with the Division's rules and policies." R., 52. The Step 5 hearing officer also noted that the Department itself, through Director John Kimball, stated that Moon was terminated for this "pattern of conduct":

> I am notifying you of my intent to impose disciplinary action for wildlife-related violations *and* the abuse of your position as related to the transfer of a moose permit...

R., 38(emphasis added).

It is clear, and the CSRB so held, that Moon did not commit an "abuse of position". Thus, all the Department has to hang its termination of Moon on is the wildlife incident. Yet, the Department did not terminate Moon when it learned of Moon's participation, if any, in the wildlife incident. R., 38. Instead, it authorized and then waited until an investigation

came up with the second charge. Only after this second charge was made was Moon terminated. Id. When asked about whether the wildlife incident alone was enough to terminate Moon, Director Kimball was less than unequivocal: "It wasn't alone. [So] I can't tell you that." R., 144. Indeed, this statement *is* telling. If the wildlife incident had been enough to terminate Moon, Kimball would have stated as much. Kimball did not do so. If the wildlife incident had been enough, Moon would have been terminated after the incident was discovered, but he was not terminated.

Therefore, without the "pattern of conduct" upon which the Step 5 hearing officer based her determination, and with the tacet admission by the Department itself that the wildlife incident alone was not sufficient to terminate Moon, the Department has been forced to assert its Cross-Appeal. Accordingly, since there is no merit to this Cross-Appeal (nor even standing to assert it), Moon requests that this Court reverse his termination, on a basis that all parties already understand - that Moon's participation in the wildlife incident is so disproportionate to the penalty imposed as to constitute legal error.

CONCLUSION

Moon's actions do not merit termination. While Moon may have made a mistake by acting negligently, this mistake does not deserve the drastic penalty of dismissal. This penalty is simply not proportionate to the offense, and very inappropriate considering all of the mitigating circumstances of this case, including the fact that Moon was off-duty at the time of the incident.

Furthermore, the Department's Cross-Appeal is without merit, while the Department is without standing to assert it. The facts clearly show that Moon did not engage in an "abuse of position", since he did not acquire any special privileges, and did not use or abuse his position at all.

Moon is certainly entitled to one reasonable mistake during a period of nearly two decades of loyal and reputable public service. Moon urges the Court to overrule the CSRB's decision to uphold Moon's termination based on his single, unintentional mistake.

DATED this 9TH day of October, 1998.

COHNE, RAPPAPORT & SEGAL

By: _____

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CERTIFICATE OF HAND-DELIVERY

I HEREBY CERTIFY that I am a member of and/or employed in the law firm of **COHNE, RAPPAPORT & SEGAL, P.C.,** 525 East First South, Suite 500, P.O. Box 11008, Salt Lake City, Utah 84147-0008, and that in said capacity, I caused two (2) true and correct copies of the foregoing to be hand-delivered to the person(s) named below:

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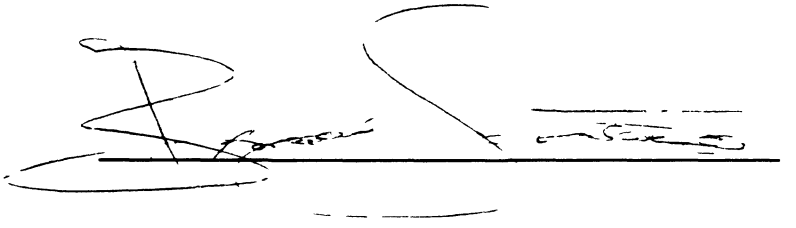
on this 14th day of October, 1998.



IN THE UTAH COURT OF APPEALS

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RANDY G. MOON, Petitioner, vs. CAREER SERVICE REVIEW BOARD, and the UTAH DEPARTMENT OF NATURAL RESOURCES, Respondent.	)	**ADDENDUM** **(Items Not Found in Addendum to First Apellate Brief)** Case No. 980134-CA
STATE OF UTAH, DEPARTMENT OF NATURAL RESOURCES, Petitioner, vs. UTAH CAREER SERVICES REVIEW BOARD, Respondent.	)	

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Dimas BONET, Petitioner, v. UNITED STATES POSTAL SERVICE, Respondent

No. 80-1502

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

661 F.2d 1071; 1981 U.S. App. LEXIS 15839; 108 L.R.R.M. 3158

November 20, 1981

PRIOR HISTORY:

Petition for Review of an Order of the Merit Systems Protection Board.

CORE TERMS: misconduct, removal, nexus, postal service, applicant, off-duty, postal, indictment, effective, indecent, adversely affect, public confidence, immoral conduct, indecency, substantial evidence, judicial review, suitability, immoral, disciplinary action, disgraceful, unsupported, manager, fitness, sexual misconduct, stepdaughter, notoriously, regulation, personnel, adversely, dishonest

COUNSEL: Armando Peralta, Gus Rallis, El Paso, Tex., for petitioner.

Alexander Younger, Dept. of Justice, Washington, D. C., for respondent.

JUDGES: Before POLITZ and RANDALL, Circuit Judges, and PARKER n*, District Judge.

* District Judge of the Middle District of Louisiana, sitting by designation.

OPINIONBY: POLITZ

OPINION: [*1072]

This appeal arises pursuant to the judicial review provisions of the Civil Service Reform [*1073] Act of 1978 (the Act), *5 U.S.C. § 7703.* n1 Dimas Bonet appeals the decision of the Merit Systems Protection Board (the Board) affirming his discharge from employment with the United States Postal Service (Postal Service) because of alleged grossly immoral off-duty conduct. Finding no evidence in support of the conclusion that Bonet's removal will promote the efficiency of the Postal Service, we reverse and remand for further proceedings.

n1. Since the administrative proceedings appealed from were instituted subsequent to the January 11, 1979, effective date of the Act, its provisions for judicial review apply to the instant appeal. Civil Service Reform Act of 1978, Pub.L.No. 95-454, § 907, 92 Stat. 1111, 1227 (1978). See *Motley v. Secretary of the United States Dep't of the Army, 608 F.2d 122 (5th Cir. 1979).* Thus, appeal from the final administrative decision is made directly to a United States Court of Appeals. *5 U.S.C.* § *7703*(a)(1) & (b)(1).

The Facts

On November 28, 1979, Dimas Bonet was fired from the Postal Service after serving 21 years with that department (and a total 24 years with the federal government). At the time of his discharge, Bonet was manager of an El Paso, Texas, post office branch station.

The Postal Service instituted an investigation of Bonet following the August 11, 1979, publication in an El Paso newspaper of the names of 22 people, including Bonet, who were indicted by an El Paso county grand jury. Bonet was charged with indecency with a child. The indictment was based upon an alleged indecent act by Bonet involving his eleven-year-old stepdaughter. On September 7, 1979, the indictment against Bonet was dismissed, due to the unwillingness of the mother to prosecute and a family reconciliation.

The Postal Service secured a copy of the district attorney's file and, on October 25, 1979, issued Bonet a notice of proposed removal. Simultaneously, Bonet was suspended, effective October 29, 1979. The Postal Service's proposed removal action was based on: (1) the charge against Bonet of indecency with a child, and (2) other alleged acts of indecency committed by Bonet said to constitute criminal, dishonest, notoriously disgraceful, and immoral conduct. Bonet denied the charges. On November 8, 1979, the Postal Service removed Bonet on the basis of the two charges listed in the notice of

proposed removal.

Bonet appealed the Postal Service decision to the Merit Systems Protection Board, which affirmed the agency action, finding that both charges were supported by a preponderance of the evidence. n2 Moreover, the Board concluded that Bonet's removal would promote the efficiency of the Postal Service.

n2. The evidence included a copy of the newspaper article in which Bonet's name and address appeared and the following items taken from the district attorney's file: (1) the statements of the eleven-year-old and twelve-year-old stepdaughters of Bonet detailing incidents involving Bonet's indecent conduct with them; (2) the statement of a detective who took the report of Bonet's six-year-old stepdaughter in which she related one incident involving Bonet's indecent conduct with her; and (3) the statement of Bonet's wife, the mother of the girls, describing one incident she witnessed involving Bonet's indecent conduct with one of her daughters.

On appeal, Bonet contends that no findings were made and no evidence exists in the record to support the conclusion that his discharge will promote the efficiency of the service. Accordingly, Bonet argues, the Board's decision was arbitrary, capricious, and an abuse of discretion, and, therefore, must be reversed.

The Statutory Provisions

The Civil Service Reform Act of 1978, Pub.L.No. 95-454, 92 Stat. 1111 (codified in scattered sections of 5 U.S.C.), retains the same measure of protection for the federal civilian employee that was guaranteed by statute n3 prior to enactment of the new civil service legislation. Thus, the 1978 Act provides that the federal government employer may discharge its employees "only for such cause as will promote the efficiency of the [*1074] service." *5 U.S.C. 7513*(a). The 1978 Act further provides that, absent criminal conviction, an agency may take disciplinary action against an employee only on the basis of conduct that adversely affects the performance of the employee himself or of other employees. n4 Administrative regulations adopted to effectuate the purposes of the Act specify that disciplinary action against any employee to "promote the efficiency of the service" must be based on: (1) whether the conduct of the individual may reasonably be expected to adversely affect effective performance by the employee of the duties of his position, or (2) whether such conduct may reasonably be expected to adversely affect the effective performance by the agency itself of its duties and responsibilities. n5

n3. Originally enacted by Pub.L.No. 89-554, 80 Stat. 527 (1966) (and formerly codified at *5 U.S.C. § 7501*(a)).

n4. *5 U.S.C. § 2302*(b)(10). The section prohibits agency personnel action that discriminates for or against any employee "on the basis of conduct which does not adversely affect the performance of the employee" or "the performance of others," except that in determining suitability the agency may take "into account" any "conviction" of the employee for any crime. *5 U.S.C. § 2302*(b)(10). See Comment, Removal for Cause from the Civil Service: The Problem of Disproportionate Discipline *28 Am. U.L. Rev. 207, 211 n.28 (1979).*

n5. 5 C.F.R. § 731.201 & § 731.202(a). Under these regulations, the Office of Personnel Management, before it can instruct an agency to remove an employee, must determine that such action will promote the efficiency of the service on the basis of:

(1) Whether the conduct of the individual may reasonably be expected to interfere with or prevent effective performance in the position applied for or employed in; or

(2) Whether the conduct of the individual may reasonably be expected to interfere with or prevent effective performance by the employing agency of its duties and responsibilities.

5 C.F.R. § 731.202(a).

Accordingly, in an agency removal action based on employee misconduct, the agency must make two determinations: (1) that the employee, in fact, committed the alleged misconduct; and (2) that the employee's discharge, based on this misconduct, will promote the efficiency of the service. *Cooper v. United States, 226 Ct. Cl. 75, 639 F.2d 727 (Ct.Cl. 1980); Phillips v. Bergland, 586 F.2d 1007 (4th Cir. 1978).* With regard to the latter determination, the statutory scheme anticipates that the agency will establish what has been termed a "vital nexus" between the misconduct-whether it be criminal, immoral, or both-and the efficiency of the service. See *Cooper v. United States, 639 F.2d at 729; Phillips v. Bergland, 586 F.2d at 1011; Young v. Hampton, 568 F.2d 1253 (7th Cir. 1977); Doe v. Hampton, 184 U.S. App. D.C. 373, 566 F.2d 265 (D.C.Cir.1977).*

The Standard of Judicial Review

With the enactment of the civil service reform legislation in 1978, Congress supplied the courts of appeals with a specific standard of review applicable in federal employee appeals from adverse agency action. The reviewing court is directed to set aside any agency action, findings, or conclusions found to be:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence.

5 U.S.C. § *7703*(c). n6

n6. The same standard of review was applied by a majority of the circuits prior to the enactment of this specific provision for judicial review. See, e.g., *DeLong v. Hampton, 422 F.2d 21 (3d Cir. 1970); Byrd v. Campbell, 591 F.2d 326 (5th Cir. 1979); Elliott v. Phillips, 611 F.2d 658 (6th Cir. 1979); Calhoun v. Bailar, 626 F.2d 145 (9th Cir. 1980); Henkle v. Campbell, 626 F.2d 811 (10th Cir. 1980); Johnson v. United States, 202 U.S. App. D.C. 187, 628 F.2d 187 (D.C.Cir.1980); Masino v. United States, 218 Ct. Cl. 531, 589 F.2d 1048 (Ct.Cl.1978).*

At least one circuit had rejected the substantial evidence element of the pre-Act majority review standard. See *Young v. Hampton, 568 F.2d 1253 (7th Cir. 1977); Wroblaski v. Hampton, 528 F.2d 852 (7th Cir. 1976).*

The essence of Bonet's complaint on appeal is that the agency decision is arbitrary and capricious because it is not based on specific findings of a "nexus" between the charged misconduct and the efficiency of [*1075] the service, and that the record would not support such findings. n7

n7. Bonet does not raise as an issue on appeal whether substantial evidence exists in the administrative record to support the finding that Bonet committed the conduct charged. We, therefore, do not discuss that element of the agency's removal action.

We find no evidence exists in the administrative record to support the conclusion that Bonet's removal will promote the efficiency of the service. The administrative finding rests on the assumption that the retention of an employee who commits sexually indecent conduct with minors, regardless of any circumstances and without regard to whether this conduct is a matter of public knowledge or not, necessarily reflects adversely on the image of the service, and the further assumption that sanctions against an employee who violates a general standard of off-duty conduct expected of employees necessarily promotes the efficiency of the service.

The Agency Record and the Administrative Findings

Bonet's discharge is based upon his off-duty conduct constituting a violation of section 661.53 of the Code of Ethical Conduct, Employee and Labor Relations Manual of the United States Postal Service. Section 661.53, entitled "Unacceptable Conduct," provides:

No employee will engage in criminal, dishonest, notoriously disgraceful or immoral conduct, or other conduct prejudicial to the Postal Service. Conviction of a violation of any criminal statute may be grounds for disciplinary action by the Postal Service, in addition to any other penalty imposed by or pursuant to statute.

The formal notice of proposed discharge lists two charges, alleging five sexually indecent acts Bonet committed with his stepdaughters in his home. The notice concludes: "Conduct of this nature reflects unfavorably upon the image of the U. S. Postal Service and flagrantly violates the standards of conduct prescribed for-and required of-all employees."

The agency discharge, affirmed by the Board, relied upon the following evidentiary showings: (a) the copy of a newspaper account of 22 indictments by the county grand jury, one of which named Bonet, gave his address and noted the offense ("indecency with a child"), without identifying him as a postal employee; and (b) two in-house investigative memoranda prepared by a postal inspector identifying and attaching the district attorney's file, accompanied by a copy of a Texas statute indicating that the conduct charged was criminal. The memoranda noted that the indictment had been dismissed, primarily at the insistence of the mother of the children, since a reconciliation had been effected. The agency report in support of the dismissal acknowledged a communication from the Texas Department of Human Resources advising that the state agency was not filing any charges in connection with the allegations of sexual misconduct and commending Bonet and his family for the initiative exercised by them in resolving their problems.

Finding the sexual misconduct proved by the affidavits, the Postal Service discharged Bonet for gross immorality. The agency acknowledged that Bonet was "a good manager," but stated:

(H)is discharge is not predicated upon his work record during the period of his employment, but is predicated upon the appellant's immoral conduct -unacceptable conduct for a postal employee .... (T)he acts committed by the appellant, if committed off duty, if a serious crime, and if immoral or unethical is (sic) sufficient justification for discipline up to and including discharge .... The acts committed by the appellant are acts protected against in every nation of this globe. It rubs strongly against the moral fiber of a civilized society-it cannot be said to be ethical; it cannot be said to be moral. While the appellant may argue that it is not job related, it is certainly conduct that is contrary to established work rules [*1076] and language of the ELM (Employees and Labor Relations Manual).

(Emphasis in original.)

At this point, we note the following: (1) The agency made no finding, nor was there any evidentiary showing that the private immoral conduct adversely affected the employee in the performance of its function; (2) the indictment for indecent conduct with a minor is shown to have been dismissed; and (3) so far as the record shows, the private sexual misconduct in Bonet's home is known to the employing authority only because of an in-house postal investigation. A dismissed indictment as to one incident, without more, does not show public knowledge of the employee's sexual misconduct or that it is "notorious."

The Administrative Review

On review of the agency's discharge of Bonet, the Merit Systems Protection Board found the substantive misconduct to be proved adequately and found that it constituted cause for discharge, being conduct in violation of section 661.53, the code of ethical conduct for employees. As noted, this section prohibits any employee from engaging "in criminal, dishonest, notoriously disgraceful or immoral conduct, or other conduct prejudicial to the Postal Service." (Emphasis added.) For purposes of argument, the Board accepted the employee's contention that the conduct was not "criminal." It held, however, that the conduct was "disgraceful," "immoral," and "notorious" as (in the Board's words) "evidenced by the newspaper item which identified the appellant as having been charged with the offense of Indecency with a Child." (Emphasis added.)

We have already stated that a dismissed indictment does not, without more, constitute notorious knowledge of conduct merely charged by an indictment. Nor are we persuaded of the correctness of the Board's unsupported assumption that because Bonet was the manager of a large urban branch office, "(therefore) he was known as a Postal employee by a large segment of the population." (Emphasis added.) Aside from these deficiencies in the findings, the Board fell into clear error in concluding-on the showing made-that the discharge was shown to "promote the efficiency of the service," a statutory prerequisite for disciplinary action against a protected employee.

The Efficiency of the Service Determination

Before the Board and this court, the Postal Service argued that to maintain Bonet as a branch manager of an important postal station, in light of public knowledge of his indictment for indecency with a child, could conceivably undermine the public confidence and trust in postal employees necessary for the efficient collection and delivery of the mails. Based upon this reasoning n8-albeit unsupported by any evidentiary showing on the administrative record-the Board found, "the conduct with which (Bonet) was charged could reasonably be expected to interfere with or prevent the effective performance by the agency of its duties and responsibilities."

n8. The agency's argument that the public confidence will possibly be undermined absent Bonet's removal applies only to the charge against Bonet based upon his indictment for indecency with a child. The Board's statement that the charge of criminal, dishonest, notoriously disgraceful, and immoral conduct with regard to other sexual incidents is "part and parcel of the same behavior for which he was indicted and which thereby became generally known," is unfounded. Evidence is lacking that the specifics of that conduct were made available to the public in general at any time, or will become known publicly in the future. Thus, considering the inapplicability of the public confidence argument to the second charge of misconduct, we find that the agency made no attempt to establish a nexus between that conduct and the efficiency of the service.

The agency cannot satisfy the statutory requirement that an employee's removal promote the efficiency of the service by use of unsupported, general assertions that such action is necessary to maintain the public confidence. To permit otherwise would be to render nugatory the protections afforded the federal employee by the imposition [*1077] of a standard for removal which requires a connection between employee misconduct (especially when off-duty and non-work related) and the job. n9 The agency must demonstrate, therefore, a relationship between this employee's misconduct and the spectre that public confidence will be undermined. See Phillips v. Bergland; Young v. Hampton; Doe v. Hampton. See also Comment, supra note 4, at 227.

n9. As the court emphasized in *Doe v. Hampton, 184 U.S. App. D.C. 373, 566 F.2d 265, 272 n.20 (D.C.Cir.1977):*

> The nexus requirement serves the salutary end of helping to ensure against abuse of personnel regulations by mandating that an adverse action be taken only for reasons that are directly related to a legitimate governmental interest, such as job performance. As a corollary, it also serves to minimize unjustified governmental intrusions into the private activities of federal employees.

Nor is it sufficient that the agency rely on internal regulations proscribing in general certain employee conduct (e.g., "immoral" or "disgraceful") as proof of the required nexus. The Postal Service's reliance on its code of ethical conduct in this respect amounts to a presumed or per se nexus. The government maintains that a per se nexus is appropriate when the employee engages in conduct like that charged to Bonet. While we agree that the off-duty conduct attributed to Bonet is indeed reprehensible-and we, by no means, intend to mitigate or condone such conduct by our disposition of the instant appeal, nor to intimate upon proper showing of nexus that it could not be cause for disciplinary action-we cannot agree that the agency is thereby relieved of its statutory duty to determine the requisite connection between the employee misconduct and the possible undermining of public confidence.

Despite our reflective revulsion for the type of off-duty misconduct in question, whether resulting from a now-cured mental disability or not, the 1978 Act does not permit this court nor an employing agency to characterize off-duty conduct as so obnoxious as to show, per se, a nexus between it and the efficiency of the service. The 1978 Act prohibits the discharge of a federal employee for conduct that does not adversely affect the performance of that employee or his co-employees, *5 U.S.C. § 2302*(b)(10). n10 While the administrative [*1078] regulations provide that an essential determination for discharge of an employee to promote the efficiency of the service is that the conduct charged must reasonably be expected to adversely affect the employee's effective performance of his duties or the effective performance by the employing agency of its responsibilities. 5 C.F.R. § 731.202(a). See note 5, supra. Furthermore, the statutory standard of judicial review now applicable directs us to set aside any agency findings or conclusions found to be unsupported by substantial evidence. *5 U.S.C. § 7703*(c).

n10. *5 U.S.C. § 2302*(b)(10) provides:

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority-
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> ....
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> (10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, or the District of Columbia, or of the United States.

In enacting this 1980 provision, Congress was specifically concerned that disciplinary action not be directed against a protected employee for off-duty misconduct unless it was related to the employee's or the agency's performance of duty. See House Conference Report No. 95-1717, 95th Cong.2d Sess., reprinted in (1978) U.S.Code Cong. & Ad.News 2723, 2864. Entitled "Conduct Unrelated to Job Performance," the report states:

> The Senate bill contains no express provision concerning nonperformance related conduct of an employee or applicant.
>
> The House amendment specifies that it is a prohibited personnel practice to discriminate for or against any employee or applicant on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others. The bill also provides, though, that nothing in the paragraph shall prohibit an agency from taking into account any conviction of the employee or applicant for any crime of violence or moral turpitude when determining suitability or fitness.
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> The conference report in section 2302(b)(10) adopts the House provision modified so that conviction of a crime may be taken into account when determining fitness or suitability of an employee or applicant. This provision is not meant as an encouragement to take conviction of a crime into account when determining the suitability or fitness of an employee or applicant for employment. Nor is it to be inferred that conviction of a crime is meant to disqualify an employee or an applicant from employment. The conferees intend that only conduct of the employee or applicant that is related to the duties to be assigned to an employee or applicant or to the employee's or applicant's performance or the per-

formance of others may be taken into consideration in determining that employee's suitability or fitness. Conviction of a crime which has no bearing on the duties to be assigned to an employee or applicant or on the employee's or applicant's performance or the performance of others may not be the basis for discrimination for or against an employee or applicant.

These provisions clearly signal a legislative intent that the agency must demonstrate by sufficient evidence that the off-duty misconduct, upon which the disciplinary action is founded, adversely affects the performance of the duties of the employee or of the agency. We further conclude, in light of the statutory requirements, that the reviewing authority may not place upon the employee, as the Board did, the burden of showing that his continued employment will not affect the efficiency of the service. The Board may not shift the burden of proof by presumption or application of the per se rule.

Those pre-Act cases recognizing that certain employee misconduct on its face establishes the requisite nexus can generally be distinguished as involving work-related activities easily identifiable with and directly connected to employee performance and agency efficiency. Thus, the following misconduct has been considered to have a bearing "on its face" on the efficiency of the service: insubordination, n11 falsification of official time reports, n12 and misuse of official funds. n13 Similarly, certain misconduct, although taking place away from the workplace, has been found to be so closely associated with the type of work performed by the employee that the nexus can be presumed. In *Hoover v. United States, 206 Ct.Cl. 640, 513 F.2d 603 (Ct.Cl.1975),* the removal of an IRS tax technician responsible for overseeing taxpayer returns, who himself falsified his personal tax returns, was upheld.

n11. *Henkle v. Campbell, 626 F.2d 811 (10th Cir. 1980); Meehan v. Macy, 129 U.S. App. D.C. 217, 392 F.2d 822 (D.C.Cir.1968).*

n12. *Pascal v. United States, 211 Ct. Cl. 183, 543 F.2d 1284 (Ct.Cl.1976).*

n13. *Terry v. United States, 204 Ct.Cl. 543, 499 F.2d 695 (1974),* cert. denied, *421 U.S. 912, 95 S. Ct. 1567, 43 L. Ed. 2d 777 (1975).*

However, when the employee misconduct is off-duty and non-work related, even before the 1978 Act, the courts have been generally unwilling to presume that the discharge will promote the efficiency of the service. n14 Therefore, the courts have reversed [*1079] employee discharges founded on the following conduct: homosexual advances, n15 physical attack of a fellow employee, n16 and conviction for possession of marijuana. n17 The general thrust of these cases is that in situations involving off-duty activities, the reviewing court will require the agency to demonstrate that removal will promote the efficiency of the service. Identification of the cause for removal is not sufficient; the agency must also establish the relationship between the employee misconduct and the adverse effect on its abilities to perform successfully its assigned functions. n18

n14. However, in *Gueory v. Hampton, 167 U.S. App. D.C. 1, 510 F.2d 1222 (D.C.Cir.1974),* the court relied on the agency's regulatory determination that criminal conduct is such cause as will promote the efficiency of the service and, in effect, recognized a presumed nexus between the employee's conviction of manslaughter and the efficiency of the service. The Court of Claims cited Gueory with approval in *Wathen v. United States, 208 Ct. Cl. 342, 527 F.2d 1191, 1197 (Ct.Cl.1975),* cert. denied, *429 U.S. 821, 97 S. Ct. 69, 50 L. Ed. 2d 82 (1976),* which upheld the discharge of a federal civilian employee, who was indicted for murder and found innocent by reason of his insanity. To the extent that these opinions stand for the proposition that, in those circuits, a per se nexus is recognized even when off-duty misconduct is charged, they should be limited to criminal misconduct of the severity of homicide.

The only opinion from this circuit which might be read to support the government's position, *Anonymous v. Macy, 398 F.2d 317 (5th Cir. 1968),* is distinguishable on the basis of the standard of judicial review then applied by the reviewing court. The court upheld the discharge of a postal employee charged with engaging in homosexual acts, despite counsel's argument that the employee's conduct was private and, therefore, did not affect the efficiency of the service. Significantly, the court limited its review of the agency decision to a determination of whether it was reached in compliance with procedural requisites. Since the court refused to examine the merits of the decision-that is, whether the agency properly concluded that the employee's removal would promote the efficiency of the service-it does not support the proposition that certain off-duty conduct will support a per se nexus.

n15. *Norton v. Macy, 135 U.S. App. D.C. 214, 417 F.2d 1161 (D.C.Cir.1969).* See *Schlegel v. United States, 189 Ct. Cl. 30, 416 F.2d 1372*

(Ct.Cl.1969) (upholding an employee discharge on the basis of homosexual conduct, but not without first finding that the administrative record contained convincing proof that the employee's removal promoted the efficiency of the service).

n16. *Phillips v. Bergland, 586 F.2d 1007 (4th Cir. 1977).*

n17. *Young v. Hampton, 568 F.2d 1253 (7th Cir. 1977).*

n18. The government relies on *Cooper v. United States, 226 Ct. Cl. 75, 639 F.2d 727,* in support of its contention that, at least where the employee's misconduct is so obviously immoral (and generally considered so), a per se nexus is established. In Cooper, however, (in which the employee was discharged for indecent sexual conduct with a 5-year-old) the court on first appeal reversed the discharge on the basis that there was no substantial evidence demonstrating that the misconduct occurred. There was evidence in the record relative to the "nexus between appellant's alleged conduct and the efficiency of the service." See opinion of the Merit Systems Protection Board on remand, decision number AT752B7790411, March 25, 1981, aff'd by order of the Court of Claims, July 10, 1981, in docket number 493-79C. Moreover, while the court on initial appeal indicated implied that it would have upheld the agency's finding that the charged sexual misconduct adversely affected the employer-employee relationship, it in no way inferred that it would do so in the absence of proof in support of the agency's determination. To the contrary, the Court of Claims stated that this determination "must be supported by substantial evidence." *639 F.2d at 729.*

In the instant case, the Postal Service admitted that Bonet's employment record was satisfactory throughout his 21 year tenure and that he was considered a good station manager. The agency considered that Bonet's work record was not at issue. Rather, the issue was whether Bonet's private immoral conduct was unacceptable conduct for a postal employee. We agree that Bonet's misconduct may be unacceptable for a postal employee, or at least for a visible management position. However, it can only be the basis for discharge if the agency proves by adequate evidence that the conduct adversely affects the efficiency of the postal service. In the absence of any attempt on the part of the agency to prove any actual nexus between the misconduct and the position of employment, we cannot uphold the decision to discharge.

Appropriate Disposition

We must set aside the Board's affirmance of the agency's discharge of Bonet. The conclusory findings do not support the determination that his discharge will promote the efficiency of the service. The record is devoid of proof that Bonet's continued employment is detrimental to the public confidence and trust in the Postal Service or in its employees. Our decision rests partially on the basis of the 1978 legislation apparently not noted as applicable by either the employee or the agency in the prior proceedings. Under these circumstances, we deem it appropriate to remand this cause to the Board, with leave to remand to the agency, if it so chooses, for further proceedings consistent with this opinion.

REVERSED and REMANDED.